mond case the question as to whether every function of the office was inviolate did not come up. The question is still an open one and must be finally decided by the Court of Appeals in the principal case.

Though the Legislature may, in the exercise of its paramount authority, create State officers to administer police duties previously performed by local officers, it cannot do so in matters of a purely local nature. *People* v. *Acton* (1867) 48 Barb. 524. In that case it was held that the Legislature had no power to invest State officers with the function of issuing licenses in respect to certain occupations which are entirely of local concern, *e. g.* theatres, junkshops, pawnshops, boarding houses. This decision seems in line with the rule laid down by the principal case that if the nature of the function is essentially local the State may not interfere in the control of the function which must be left to the municipality.

In *City of Syracuse* v. *Hubbard* (1901) 64 App. Div. 587 (appeal dismissed, 168 N. Y. 668) the question was whether auditors appointed by the State could legally audit certain claims against the city, incurred in excess of the charter, and which the Legislature (Chap. 402 Laws 1901) had directed the city to pay. The Court held the act constitutional on the ground that the claims to be audited were such as the local auditors never had authority to audit, although they had the general function of auditing. Similarly by the Special Franchise Tax Law certain intangible property, which local assessors never had power to assess, was declared taxable and the duty of assessing the new taxable property given to State officers. But while in *City of Syracuse* v. *Hubbard supra* the general functions of local auditors had been left unimpaired, in the principal case the power to assess certain tangible property which they had previously assessed had been taken from the local assessors, whose general functions were to that extent diminished. See, however, on this point the opinion of KENEFICK, J. in *Buffalo Gas Co* v. *Volz* (1900) 31 Misc. 160, where the constitutionality of this same Special Franchise Tax Law was upheld.

Judge Earl, referee, proposed a rule different from that of the Appellate Division to determine whether the home rule provision has been violated. Recognizing that the object of the section was to secure substantial home rule, rather than to protect any particular function, he declared the question in every case must be, "Has the Legislature taken away from officers elected or appointed in the locality any function essential to home rule? If it has, its acts must be condemned; if it has not, the act must stand." This rule, like that of the Appellate Division, is formulated after a consideration of all the authorities, and is not based on any particular decision or decisions, but rather is an individual interpretation of their general trend.

DEVISES TO CHARITABLE USES—WHAT IS A PUBLIC CHARITY?—Who may be the beneficiaries under a devise or gift to charitable uses? The element of the greatest difficulty in the definition of a charitable use is presented in the question whether the donor or devisor has directed his intention toward proper objects of charity. Said Sir WILLIAM GRANT in *Morice* v. *Bishop of Durham* (1804) 9 Ves. 405: "Those purposes are considered charitable which are enumerated in 43 Eliz. (1601) or which, by analogies, are deemed within its spirit

and intendment." Courts have invariably had reference to the preamble of this Statute of Charitable Uses in efforts to formulate a satisfactory definition of the term. Sir WILLIAM GRANT'S concise statement was elaborated by Mr. Justice STORY in his decision of the case of *Jackson* v. *Phillips* (1867) 14 Allen, 539, 556, as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The requirement of "an indefinite number of persons" and the inclusive clause, "or otherwise lessening the burdens of government," are at once suggestive of the public feature of the charitable use or public charity. How indefinite must the beneficiaries be? May the creator of the public charity designate a class, artificially limited, for example, by social, fraternal, or religious affiliations, but still vague in numbers, or must his benefaction be open to the public in the broad, lay meaning of the word, such that the State is under an obligation to establish and maintain? The Supreme Court of Kansas has recently adopted the latter view, after having had under consideration for over a year a devise in fee to trustees "to provide a home and industrial school for the orphan children of deceased Odd Fellows of the State of Kansas," the decision being a reversal, upon reargument, of a prior decision in the same court. (1901) 64 Pac. 33. *Troutman et al.* v *De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n.* (1903) 71 Pac. 286. The devise was held not to create a public charity and void as violating the rule against perpetuities. The decision turned upon the definition of "public charity."

Two of the purposes of charitable uses laid down in terms in the statute of 43 Eliz. are contemplated by the devise in the principal case, namely, "for schools of learning" and for "education and preferment of orphans." Donations for the establishment of schools are strongly favored by the courts in dealing with public charities, limitations to a particular community or to some class forming a part of it, indefinite and vague as to numbers and individuals, being considered no obstacle, *Attorney General* v. *Lonsdale* (1827) 1 Sim. 109; and more especially is this true of schools for the education of orphans and poor scholars. *Vidal et al.* v. *The Mayor, &c., of Philadelphia* (1844) 2 How. 127; *Episcopal Academy* v. *Philadelphia* (1892) 150 Pa. 565; *People ex rel. Ellert* v. *Cogswell et al.* (1896) 113 Cal. 129.

The impossibility of fixing an exact meaning to the word "public" has long been recognized. The word is generally taken to be descriptive of the nature of the charity and not by way of distinguishing one charity from another. *Attorney General* v. *Pearce* (1740) 2 Atk. 88. As a matter of course, all charities cannot be universal and need not be. *Indianapolis* v. *Grand Master, etc.* (1865) 25 Ind. 518; *City of Petersburg* v. *Benevolent Ass'n.* (1884) 78 Va. 431. Both of these cases came up on a question of exemption from taxation, being tested by rules of strict construction; the devises were for the benefit of

classes, strictly limited to the particular society, but vague and indefinite as to individuals. The latter element appears to be the chief ingredient of the definition of a public charity in that large class of cases in which the validity of a devise, limiting the beneficiaries to a city, church, sex, association, fraternity or other definite classes of the whole public, has been questioned and established. *Attorney General* v. *Lonsdale* (*supra*); *Duke* v. *Fuller* (1838) 9 N. H. 536; *Preachers' Aid Society* v. *England* (1883) 106 Ill. 125; *Heiskell* v. *Chickasaw Lodge of Odd Fellows* (1889) 78 Tenn. 668; *Philadelphia* v. *Women's Christian Ass'n.* (1889) 125 Pa. 572; *Guilfoil* v. *Arthur* (1895) 158 Ill. 600; *Estate of Willey* (1900) 128 Cal. 1. That no private or pecuniary return is reserved; that the benefit resulting from the gift goes to the public; that the beneficiaries are not a wholly existing class, capable of designation, make the trust public in character and sustain the devise. Where a charitable trust is capable of two constructions, one of which would make it void, and the other would render it effectual, the latter must be adopted, *Bruce* v. *Presbytery of Deer* (1867) L. R. 1 Sc. & Div. App. 96, and it is generally laid down that charitable trusts are favorites of the courts. Much confusion is caused by citing cases in which exemption from taxation is claimed on the ground of public charity (*City of Philadelphia* v. *Masonic Home* (1894) 160 Pa. St. 572), as authorities for the definition of the term, public charity, or charitable trust, in its general significance; the term must be submitted to the test of conflicting canons of construction,—strict in the former and liberal in the latter.

Nor is it one of the essentials to the establishment of a public charity that the power of visitation and control must be shown to be in the Attorney-General, representing the public. This is incident to and not a constituent of the institution. If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the Attorney-General, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses. It would seem that the word "public" is taken only to indicate the nature of the devise; that the first essential is vagueness and indefiniteness; that each case must be tested by very general rules, care being taken on the one hand that the devise is not too indefinite, and on the other that the devise does not amount to a legacy, and is free from the taint of selfishness, in every sense, or private gain.

The assumption, in the prevailing opinion of the principal case, that unless the devise is a public charity it is within the rule against perpetuities would seem to be founded upon a misconception of the common-law definition of the rule which was one against the remote vesting of estates. Here the conveyance is of the fee simple, to vest immediately. Obviously there is no room for the operation of the rule. *City of Philadelphia* v. *Heirs of Girard* (1863), 45 Pa. St. 9. The result would be different were there in Kansas, as there is in New York and some other States, a statute substituting for the common-law rule against perpetuities the prohibition against the suspension of the power of alienation. Under such a statute a gift to trustees to

hold for an unascertainable body of beneficiaries would permanently suspend the power of alienation.

The problem of chancery jurisdiction over anomalous gifts to uses—not private trusts for lack of definite beneficiaries, not charities, because confined to a class in the community—should not be impossible of solution in view of a very respectable array of authority to the effect that the testator's wishes will be effectuated, the trustees being willing, to the exclusion of the heirs and personal representatives. See "Failure of the Tilden Trust." 5 Harvard Law Rev. 389.

IMPAIRMENT OF CONTRACT OBLIGATION BY CHANGE OF DECISION BY STATE COURT.—Two recent cases bring up a point upon which there has been considerable confusion in the holdings of the United States Supreme Court. *Board* v. *Gardner Savings Institute* (1902) 119 Fed. 36; *Mobile Trans. Co.* v. *Mobile* (1903) 23 Sup. Ct. Rep. 170. A discussion of the cases presents the question as to when the decision of a State Court will be considered by the United States Supreme Court to impair the obligation of a contract, so as to violate the constitutional provision on that subject.

This note does not consider the case where the State Court holds that a statute does not create any contract obligation, for in that event it is well settled since the case of *Jefferson Branch Bank* v. *Skelly* (1861) 1 Black 437, that the United States Supreme Court will examine the statute for itself and decide whether a contract obligation was created under it or not.

That part of the Constitution here concerned reads, "No State shall * * * *pass* any * * * *Law* impairing the Obligation of Contracts." The case here considered is one in which the State Court holds at one time a statute to be constitutional, and thereafter holds the same statute to be unconstitutional, or decides that not to be law which has been previously held to be law. And it is sought to find when the United States Supreme Court will, as to contracts made under the first decision, treat such a change of decision as a violation of the Constitutional prohibition.

The earliest case in which this question is much discussed is *Rowan* v. *Runnels* (1847) 5 How. 134. In that case the United States Supreme Court, in accordance with its view of the law of Mississippi at that time, had decided a certain class of contracts to be valid. The Supreme Court of Mississippi subsequently held such contracts to be illegal. A suit was brought in the United States District Court in Mississippi on one of these contracts which the Mississippi Court had at that time declared to be illegal, and the Supreme Court held that the District Court should apply the law as it understood it to be at the time the contract was made. The reason given was that to hold otherwise would be to give the decision of the Mississippi Court a retroactive effect. This decision was followed in *Gelpcke* v. *City of Dubuque* (1863) 1 Wall. 175, and also in *Douglas* v. *County of Pike* (1879) 101 U. S. 677, in which case it was said "where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the later decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected."